



## **LEGAL SERVICES CORPORATION**

### **45 CFR Part 1613**

#### **Restrictions on Legal Assistance With Respect to Criminal Proceedings**

**AGENCY:** Legal Services Corporation

**ACTION:** Final rule.

**SUMMARY:** This final rule updates the Legal Services Corporation (LSC or Corporation) regulation on legal assistance with respect to criminal proceedings. The Tribal Law and Order Act of 2010 (TLOA) amended the LSC Act to authorize LSC funds to be used for representation of persons charged with any criminal offense in tribal courts. This proposed rule will bring the regulations into alignment with the amended provisions of the LSC Act. The proposed rule will also revise the conditions under which LSC recipients can accept or decline court appointments to represent defendants in criminal proceedings.

**DATE:** The effective date of this rule is [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

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#### **SUPPLEMENTARY INFORMATION:**

##### **I. General Authorities and Impetus for Rulemaking**

The Corporation first issued 45 CFR part 1613 in 1976 to implement a statutory prohibition on the use of LSC funds to provide legal assistance in criminal cases. Section

1007 of the LSC Act prohibited the use of LSC funds to provide legal assistance “with respect to any criminal proceeding.” Sec. 1007(b)(2), Pub. L. 93-355, 88 Stat. 383 (42 U.S.C. 2996f(b)(2)). The original section 1613.2 defined “criminal proceeding” as

the adversary judicial proceeding prosecuted by a public officer and initiated by a formal complaint, information, or indictment charging a person with an offense denominated ‘criminal’ by applicable law and punishable by death, imprisonment, or a jail sentence. A misdemeanor or lesser offense tried in an Indian tribal court is not a ‘criminal proceeding.’

41 FR 38506, Sept. 10, 1976.

The following year, Congress amended section 1007(b)(2) of the LSC Act to codify the Corporation’s exemption of minor crimes in tribal courts from the types of criminal proceedings for which LSC funds could not be used. Sec. 10(b), Pub. L. 95-222, 91 Stat. 1620-1623. Congress made no further adjustments to the criminal prohibition provision until it enacted the Tribal Law and Order Act (TLOA) in 2010.

The TLOA amended section 1007(b)(2) of the LSC Act to authorize the use of LSC funds to provide representation in all criminal proceedings before tribal courts. Sec. 235(d), Pub. L. 111-211, Tit. II, Subtitle C, 124 Stat. 2282 (42 U.S.C. 2996f(b)(2)). The TLOA also had two major effects on tribal criminal jurisdiction. First, it authorized tribal courts to impose longer sentences, increasing the maximum duration from up to one year to a total of nine years for multiple charges. Sec. 234(a), Pub. L. 111-211, Tit. II, Subtitle C, 124 Stat. 2280 (25 U.S.C. 1302(c)(2)). Second, it required tribes exercising the expanded sentencing authority “at the expense of the tribal government, [to] provide an indigent defendant the assistance of a defense attorney.” Sec. 234(c)(2), Pub. L. 111-211, Tit. II, Subtitle C, 124 Stat. 2280.

Congress further expanded tribal court jurisdiction in 2013. Through the Violence Against Women Reauthorization Act of 2013 (2013 VAWA), Congress amended the Indian Civil Rights Act of 1968 to authorize tribal courts to exercise special criminal jurisdiction over domestic violence cases. Sec. 904(b)(1), Pub. L. 113-4, 127 Stat. 120-121 (25 U.S.C. 1304(a)). This “special domestic violence criminal jurisdiction” is exercised concurrently with state or Federal jurisdiction, or both, as applicable. Sec. 904(b)(2), Pub. L. 113-4, 127 Stat. 121 (25 U.S.C. 1304(b)(2)). Unlike prior congressional enactments, the 2013 VAWA explicitly authorizes tribes to exercise jurisdiction over both Indian and non-Indian defendants in certain circumstances. Sec. 904(b)(4), Pub. L. 113-4, 127 Stat. 121-22 (25 U.S.C. 1304(b)(4)).

In order for the tribe to assert special domestic violence criminal jurisdiction, the alleged act must have occurred within Indian country. Sec. 904(c), Pub. L. 113-4, 127 Stat. 122 (25 U.S.C. 1304(c)). “Indian country” is a term of art defined in 18 U.S.C. 1151. If neither the victim nor the accused is Indian, the court may not exercise jurisdiction. Sec. 904(b)(4)(A)(i), Pub. L. 113-4, 127 Stat. 121 (25 U.S.C. 1304(b)(4)(A)(i)). If only the accused is a non-Indian, the court may exercise jurisdiction only if the accused resides in the Indian country over which the tribe has jurisdiction; is employed in the Indian country of the tribe; or is a spouse, intimate partner, or dating partner of a member of the tribe or an Indian who resides in the Indian country of the tribe. Sec. 904(b)(4)(B), Pub. L. 113-4, 127 Stat. 122 (25 U.S.C. 1304(b)(4)(B)).

The 2013 VAWA also introduced another set of crimes in Indian country for which defendants are entitled to counsel at the tribal government’s expense. Section 904(d)(2) states that if a sentence of any length of time may be imposed, the defendant is

entitled to all of the rights set forth in section 202(c) of the Indian Civil Rights Act. Sec. 904(d)(2), Pub. L. 113-4, 127 Stat. 122 (25 U.S.C. 1304(d)(2)). The TLOA previously amended section 202(c) to require tribes exercising expanded criminal sentencing authority to provide counsel to defendants facing total terms of imprisonment that would exceed one year. Sec. 234(a), Pub. L. 111-211, 124 Stat. 2280 (25 U.S.C. 1302(c)(2)).

In summary, the TLOA and the 2013 VAWA amended the Indian Civil Rights Act to expand both the sentencing authority and the jurisdiction of tribal criminal courts. The TLOA also amended the LSC Act to allow the use of LSC funds for representation of criminal defendants in tribal courts facing sentences of more than a year. LSC grant recipients now have the option of using their LSC funds to provide criminal representation. Additionally, because tribes must provide defendants with counsel at tribal government expense in certain circumstances, LSC recipients may be faced with increasing numbers of judicial requests for appointments to represent criminal defendants.

## II. Procedural Background

On January 25, 2013, the Operations and Regulations Committee (Committee) of the LSC Board of Directors (Board) voted to recommend that the Board authorize rulemaking to conform Part 1613 to the amendments to the LSC Act and to address recipients' concerns regarding criminal appointments. On January 26, 2013, the Board authorized the initiation of rulemaking.

In response to the statutory changes described above, LSC sought input from experts in tribal law, including tribal court officials and practitioners, and the public to determine whether the Corporation needed to amend its regulations. LSC published a

Request for Information (RFI) regarding the restrictions on legal assistance with respect to criminal proceedings in tribal courts. 78 FR 27341, May 10, 2013. Additionally, during its July 22, 2013 meeting of the Board of Directors, the Committee heard from a panel of five experts in tribal law representing a variety of perspectives.

Pursuant to the LSC Rulemaking Protocol, LSC staff prepared a proposed rule amending Part 1613 with an explanatory rulemaking options paper. On October 22, 2013, the Board approved the proposed rule for publication in the Federal Register for notice and comment. The NPRM was published in the Federal Register on November 4, 2013. 78 FR 65933, Nov. 4, 2013. The comment period remained open for thirty days and closed on December 4, 2013.

On April 7, 2014, the Committee considered the draft final rule and recommended that the Board approve its publication. On April 8, 2014, the Board approved the final rule for publication.

All of the comments and related memoranda submitted to the LSC Board regarding this rulemaking are available in the open rulemaking section of LSC's website at

<http://www.lsc.gov/about/regulations-rules/open-rulemaking>. After the effective date of the rule, those materials will appear in the closed rulemaking section at <http://www.lsc.gov/about/regulations-rules/closed-rulemaking>.

### III. Discussion of Comments and Regulatory Provisions

LSC received seven comments on the NPRM. Five comments were submitted by law students, one was submitted by the court clerk for the Snoqualmie Tribal Court, and

one was submitted by Jonathan Asher, Executive Director of Colorado Legal Services, an LSC recipient.

Three of the commenters supported the revisions to part 1613. One commenter opposed the revisions, and the other three commenters provided comments without expressing support for or opposition to the revisions to part 1613. LSC will address only the substantive comments in this preamble. All of the comments received are posted on the rulemaking page of LSC's website: [www.lsc.gov/about/regulations-rules](http://www.lsc.gov/about/regulations-rules).

### **Section-by-Section Discussion of Comments and the Final Rule**

#### **1613.1 Purpose.**

The Corporation proposed to revise this section to state that LSC grant recipients may not represent individuals in criminal proceedings unless authorized by part 1613. The LSC Act has been amended twice to authorize criminal representation in tribal proceedings since the regulation was originally enacted in 1976, and the Corporation proposed to amend part 1613 to be consistent with those statutory amendments. LSC received no comments on this section of the proposed rule.

#### **1613.2 Definition.**

LSC proposed to amend the definition of “criminal proceeding” to remove the exclusion of misdemeanors or lesser offenses in Indian tribal courts from the definition. The Corporation received no comments on this section of the proposed rule.

#### **1613.4 Authorized representation.**

The Corporation proposed to revise § 1613.4(a) to allow recipients to undertake criminal appointments after a determination that such appointment “will not impair the recipient’s primary responsibility to provide civil legal services.” Under the current rule,

recipients must determine that accepting a criminal appointment will be “consistent with” its primary responsibility to provide civil legal services. The Corporation believed the current standard does not provide meaningful guidance because any representation of a defendant in a criminal case could be characterized as not “consistent with” a recipient’s primary responsibility to provide civil legal services. The Corporation believed that changing the standard to impairment of the recipient’s primary responsibility to provide civil legal services would provide more meaningful guidance by permitting recipients to consider the impact of accepting a criminal appointment on a recipient’s financial and human resources.

Comments: The Executive Director of Colorado Legal Services expressed concern about the proposed change in the standard for declining a criminal appointment in both tribal and non-tribal courts. He stated that “[c]hanging the standard from ‘inconsistent’ to ‘impair’ may inadvertently further limit and further complicate a grantee’s ability to provide representation to defendants in criminal cases in Tribal Court rather than ease the decision . . . A decision to accept a criminal case, arguably, would always ‘impair’ the grantees’ ability to provide civil legal assistance.” He further stated that while the Corporation may expect that its interpretations and analysis would apply to the revised standard, “it is inevitable that issues and new questions will arise and need to be addressed.” He requested that LSC consider either eliminating the standard for exercising discretion to accept or decline court appointments in criminal cases or, alternatively, amend the regulation to require that recipients be able to document a “rational basis” for exercising their discretion.

One of the law student commenters suggested that the standard for accepting or declining a court appointment in a criminal case should turn not on whether acceptance would impinge upon a recipient's ability to provide civil legal services, but whether acceptance is necessary to avoid injustice. The commenter asserted that the proposed change to the standard "encumbers" the goal of promoting equal access to justice "because [it does] not contemplate equal access to justice as being a relevant factor for a recipient to consider in determining whether to represent a criminal defendant in Indian tribal court." The commenter proposed that recipients should consider many factors in deciding whether to accept a criminal appointment, including the availability of other competent counsel to defend the accused, the necessity of a background in Tribal criminal law, the complexity of the case, expertise in criminal law, the financial resources of the accused, and whether the accused is out on bond or being held in pretrial detention.

Response: LSC will retain the language from the proposed rule. LSC continues to believe that the revised standard would provide more meaningful guidance by permitting recipients to consider the impact of accepting a criminal appointment on a recipient's financial and human resources. The revised standard is not intended to impose greater limitations on recipients' decisions regarding court appointments. To the contrary, the Corporation intends the revised standard to create greater flexibility to exercise discretion. Nothing in the proposed rule prevents recipients from considering any of the factors noted by the student commenter, including whether representation is necessary to promote equal justice, when deciding whether to accept or decline a court appointment to represent a criminal defendant.

1613.5 Criminal representation in Indian tribal courts.



The comments discussed in § 1613.4 immediately preceding (addressing representation in criminal proceedings generally) were also applicable by their terms to proposed § 1613.5. For the reasons stated in the preceding discussion, LSC is retaining the language from the proposed rule in § 1613.5.

### **List of Subjects in 45 CFR Part 1613**

Crime, Grant programs – law, Legal services, Tribal

For the reasons stated in the preamble, and under the authority of 42 U.S.C. 2996g(e), the Legal Services Corporation amends 45 CFR part 1613 as follows:

#### **PART 1613 – RESTRICTIONS ON LEGAL ASSISTANCE WITH RESPECT TO CRIMINAL PROCEEDINGS**

1. The authority citation for part 1613 is revised to read as follows:

Authority: Sec. 234(d), Pub. L. 111-211, 124. Stat. 2282; 42 U.S.C. 2996f(b)(2); 42 U.S.C. 2996g(e).

2. Section 1613.1 is revised to read as follows:

#### **§ 1613.1 Purpose.**

This part is designed to ensure that Corporation funds will not be used to provide legal assistance with respect to criminal proceedings unless such assistance is authorized by this part.

3. Section 1613.2 is revised to read as follows:

#### **§ 1613.2 Definition.**

Criminal proceeding means the adversary judicial process prosecuted by a public officer and initiated by a formal complaint, information, or indictment charging a person

with an offense denominated “criminal” by applicable law and punishable by death, imprisonment, or a jail sentence.

4. In § 1613.4, paragraph (a) is revised to read as follows:

**§ 1613.4 Authorized representation.**

\* \* \*

(a) Pursuant to a court appointment made under a statute or a court rule of equal applicability to all attorneys in the jurisdiction, if authorized by the recipient after a determination that acceptance of the appointment would not impair the recipient’s primary responsibility to provide legal assistance to eligible clients in civil matters.

\* \* \* \* \*

5. Section 1613.5 is added to read as follows:

**§ 1613.5 Criminal representation in Indian tribal courts.**

(a) Legal assistance may be provided with Corporation funds to a person charged with a criminal offense in an Indian tribal court who is otherwise eligible.

(b) Legal assistance may be provided in a criminal proceeding in an Indian tribal court pursuant to a court appointment only if the appointment is made under a statute or a court rule or practice of equal applicability to all attorneys in the jurisdiction, and is authorized by the recipient after a determination that acceptance of the appointment would not impair the recipient’s primary responsibility to provide legal assistance to eligible clients in civil matters.

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